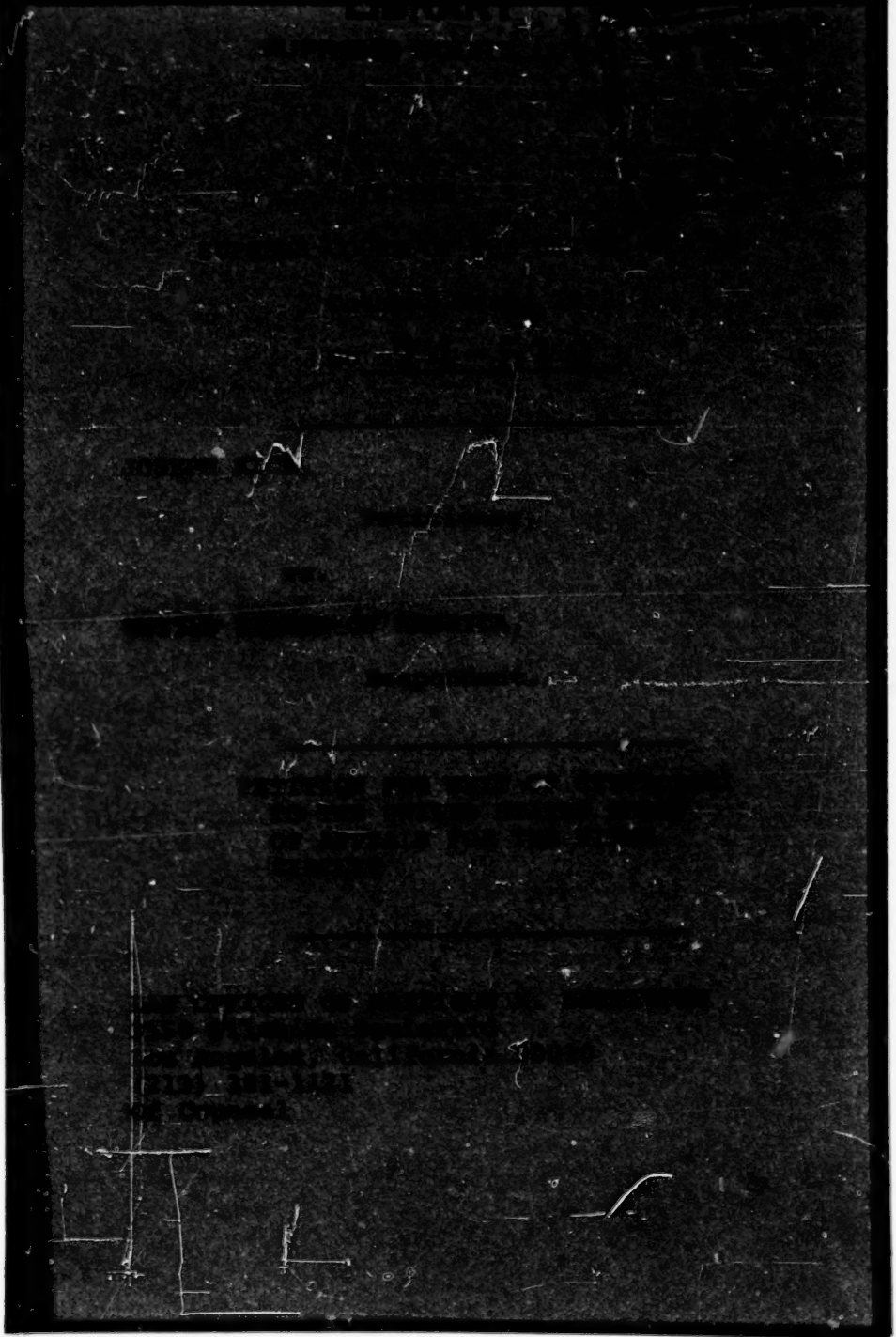

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, JOSEPH SICA, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit.

JURISDICTION

The date of the judgment sought to be reviewed is August 7, 1974 and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional and statutory provisions:

1. The Fifth Amendment of the Constitution of the United States provides as follows:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .".

2. 28 U.S.C. Section 2255 provides as follows:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . may move the court which imposed the sentence to

vacate, set aside or correct the sentence.

* * *

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

QUESTIONS PRESENTED FOR REVIEW

1. Where, nearly two years prior to this Court's decision in GIDEON V. WAINWRIGHT, 372 U.S. 335, Petitioner himself introduced on direct examination two prior felony convictions which are now constitutionally infirm under GIDEON; and where said introduction of the felony convictions was made as a necessary matter

of trial strategy to take the "sting" out of the Government prosecutor's then-permissible and inevitable introduction of said convictions; is petitioner now precluded from complaining by a motion under 28 U.S.C. Section 2255 of this forced choice which improperly brought these prior convictions to the jury's attention?

2. (a) Is it an abuse of discretion and a violation of the statute 28 U.S.C. Section 2255 as interpreted by this Court in SANDERS V. UNITED STATES, 373 U.S. 1, for a District Court Judge to deny without a hearing a Section 2255 motion which, along with the files and records of the case, makes a prima facie showing of reliance on three unconstitutionally obtained felony convictions by the judge in setting sentence?

(b) May the original sentencing judge constitutionally deny without a

hearing a motion under Section 2255 which makes a prima facie showing that the same judge had enlarged and enhanced petitioner's sentence based on three alleged prior felony convictions all unconstitutionally obtained?

(c) Should the Supreme Court of the United States exercise its supervisory powers over the procedures in inferior federal courts to require as a matter of fundamental fairness that a different judge other than the judge imposing sentence hear motions under Section 2255 which allege enlargement or enhancement of sentences based on unconstitutionally obtained prior convictions?

(d) Is the original sentencing judge constitutionally forbidden by the Due Process Clause of the Fifth Amendment from deciding a motion under Section 2255 alleging that judge's unconstitutional enlargement or enhancement

of petitioner's sentence?

STATEMENT OF THE CASE

I

Petitioner JOSEPH SICA, and others, were indicted in a ten count indictment by the Grand Jury of the Southern District of California on September 2, 1959. Petitioner was charged in three counts of alleged violations of 18 U.S.C. Sections 1951 and 371.

At trial, the government's case against petitioner depended entirely upon proof that petitioner was an individual with a known reputation for violence and that petitioner entered into a conspiracy whereby his alleged notoriety for violence was utilized to coerce victim boxing managers into acquiesence with the defendants' plan to control professional boxing matches.

Anticipating the Government Attorney's intention to introduce prior felony convictions of robbery, larceny of

the person, and car theft to prove this alleged reputation for violence, counsel for petitioner decided as a matter of trial strategy to introduce two prior convictions, on direct examination of petitioner, to take the "sting" out of the effect said convictions would have upon the jury.

On cross-examination of petitioner, the United States Attorney reiterated the two convictions and introduced a third felony conviction. During the course of the trial and in the presence of the jury, the United States Attorney vigorously referred to the three prior felony convictions to establish the probative fact of Petitioner's alleged reputation for violence.

The three felony convictions were all unconstitutionally obtained, in that petitioner was not represented at these earlier proceedings by counsel

nor did he have the advice of counsel nor did he waive the right to counsel. The three felony convictions were essential to establish the central issue in the Government's case against petitioner; namely, petitioner's alleged notoriety for violence.

II

After petitioner's conviction on three counts and prior to sentencing, the presiding trial judge, Judge Tolin, died. In his stead, Judge George Boldt was assigned to dispose of all post-conviction matters including sentencing. On December 2, 1961, Judge Boldt sentenced petitioner on one count to the maximum penalty of twenty years and a fine of $10,000. On each of the two other counts, petitioner was sentenced to five years, to run consecutive to each other, but to run concurrently with the sentence of twenty years. On appeal, one of the five year sentences

was reversed and dismissed.

As the record of the proceedings show, heavy emphasis was placed on the alleged prior felony convictions at the time of sentencing. Both the United States Attorney and Judge Boldt himself referred explicitly to the three constitutionally infirm convictions as considerations in determining the severity of the sentence imposed.

At sentencing, the United States Attorney said:

> "Joseph Sica. This defendant's reputation for violence and brutality defies description. We are not reluctant to suggest to the court that he is incorrigible and beyond known methods of rehabilitation. Sica's FBI record comprises five pages and lists over 20 arrests. He has been convicted of three felonies and of at least two

misdemeanors, the latter bearing the indicia of racketeering activity. One misdemeanor involves a cutting of telephone wires arising out of a wire service dispute in which Sica and Mickey Cohen assaulted one Russ Brophy. The second misdemeanor is for conspiracy to commit bookmaking." (Transcript of Proceedings, page 8031) (Emphasis added).

At sentencing, Judge Boldt said:

"Much of what has been said of Carbo applies to Sica. Sica may not be as widely known, or a criminal of national repute, but has a long record of violence, vice and viciousness, including felony convictions and involvement in various crimes of violence. By any definition or standard, Sica appears to be an habitual criminal. There is no indication that Sica

has ever followed any productive or peaceful pursuit of any consequence in all the 50 years of his life. He, too, must be restrained from preying on the communicty for a substantial period--somewhat less than that of Carbo because of Carbo's more important part in the offenses involved in this particular case." (Transcript of Proceedings, page 8039) (Emphasis added).

On August 8, 1972, petitioner filed this motion under Section 2255 with the District Court of the Southern District of California, Central Division. This motion was filed to vacate the conviction as based on the unconstitutionally obtained prior felony convictions, or, in the alternative, to correct the sentence, based on the same unconstitutionally obtained prior convictions.

On May 14, 1973, the motion was

transferred from the docket of Judge Lawrence Lydick to the docket of the original sentencing judge; namely, Judge George Boldt.

On November 2, 1973, the motion was denied without a hearing and said order was entered November 5, 1973.

On appeal, the Ninth Circuit affirmed without a hearing the District Court's denial of petitioner's Section 2255 motion.

Petitioner has served almost 12 years of the 20 year sentence and is presently on parole. Parole status is "custody" within the meaning of 28 U.S.C. Section 2255, and thus petitioner's application is not moot. WAPNICK V. UNITED STATES, 406 F.2d 741 (2d Cir. 1969).

REASONS FOR THE ALLOWANCE OF THE WRIT

A. BECAUSE PETITIONER'S DECISION TO INTRODUCE HIS PRIOR FELONY CONVICTIONS AT TRIAL WAS MADE NEARLY TWO YEARS BEFORE THIS COURT'S DECISION IN GIDEON V. WAINWRIGHT, SUCH INTRODUCTION DOES NOT CONSTITUTE A WAIVER OF RIGHTS UNDER GIDEON, AND PETITIONER IS NOT NOW PRECLUDED FROM COMPLAINING OF THE ADMISSION OF SAID CONVICTIONS INTO EVIDENCE TO PROVE THE GOVERNMENT'S CASE.

In affirming the District Court's rejection of petitioner's Section 2255 motion to set aside the conviction because it was based on unconstitutionally obtained prior convictions, the Ninth Circuit only cited its earlier

decision in SHORTER V. UNITED STATES, 412 F.2d 428 (9th Cir. 1969), cert. denied, 396 U.S. 970, for the holding that petitioner, having himself introduced said prior convictions upon direct examination, could not now complain of a violation of his constitutional rights under GIDEON V. WAINWRIGHT.

In so ruling, the Circuit Court ignored the fact that SHORTER, as well as all other cases cited by the Government to support the principle in SHORTER, involved trials occurring after March 18, 1963, the date on which GIDEON was decided. Consequently, in those cases relied upon by the Government and the Ninth Circuit, the petitioners therein had full knowledge of GIDEON or were chargeable with knowledge of GIDEON when they chose their trial strategy, i.e., to take the "sting"

out of the alleged prior convictions by offering the evidence themselves to "possibly soften the anticipated blow in the eyes of the jury." SHORTER at page 431.

However, in the instant case, petitioner's decision to introduce the constitutionally tainted priors at trial was made on May 3, 1961, approximately one year and 10 months prior to the day on which GIDEON was decided by this Court. GIDEON, UNITED STATES V. TUCKER, 404 U.S. 443, LOPER V. BETO, 405 U.S. 473, and BURGETT V. TEXAS, 389 U.S. 109, were all decided after May 3, 1961.

Petitioner forcefully contends that he should not now be held chargeable for the "Lady-or-the-Tiger" choice petitioner's counsel made to anticipate the government's introduction of convictions which, under then-current constitutional doctrine, were perfectly admissible.

Petitioner did not have the choice of the petitioner in SHORTER either to rely on GIDEON or to anticipate the Government's introduction of the convictions to take the "sting" out of them. For these reasons, no intentional waiver of GIDEON may be implied on the part of petitioner.

B. IT WAS AN ABUSE OF DISCRETION AND A VIOLATION OF THE STATUTE FOR THE DISTRICT COURT JUDGE TO DENY WITHOUT A HEARING PETITIONER'S SECTION 2255 MOTION MAKING A PRIMA FACIE SHOWING OF RELIANCE ON UNCONSTITUTIONALLY OBTAINED FELONY CONVICTIONS BY THE JUDGE IN SETTING SENTENCE.

In denying without a hearing petitioner's motion to correct sentence because it was based in part on unconstitutionally obtained prior convictions, Judge Boldt,

the original sentencing judge, made the following remarks:

> "The unusual facts and circumstances in which the challenged sentence was considered and determined will be briefly stated and is entirely based on the record or within the personal knowledge of the undersigned." (Order Denying Motion, page 2) (Emphasis added).
>
> "The laborious process of closely examining every page of the trial transcript in order to evaluate the credibility and significance of the testimony of all witnesses, including SICA, provided a more important and significant basis for determining the sentence appropriate for SICA than any information contained in the pre-sentence report and in the mind of

this judge, in itself, amply justified the sentence imposed."

(Order Denying Motion, pages 2-3) (Emphasis added).

Judge Boldt's denial to petitioner of a hearing is contrary to the language of 28 U.S.C. Section 2255 as interpreted by this Court in SANDERS V. UNITED STATES, 373 U.S. 1. There, this Court said regarding Section 2255:

> "The statute in terms requires that a prisoner shall be granted a hearing on motion which alleges sufficient facts to support a claim for relief unless the motion and the files and records of the case 'conclusively show' that the claim is without merit." SANDERS, page 6.

Under the statute, petitioner is entitled to a hearing if:

(a) His pleadings allege facts sufficient to support his claim for relief, unless

(b) The motion and the files and records of the case "conclusively show" that the claim is without merit.

Petitioner's pleadings show that all three prior convictions in issue were unconstitutionally obtained. The files and records of the case show that the sentencing judge gave explicit attention to the three previous felony convictions. Under UNITED STATES V. TUCKER, a prima facie case has been established and a hearing to reconsider the sentence imposed is required.

In TUCKER, the sentencing judge, "the record shows, gave explicit attention to the three previous felony convictions," two of which had been

unconstitutionally obtained. 404 U.S. at page 443. In the instant case, the sentencing judge, Judge Boldt, gave, the record shows, explicit attention to the three previous felony convictions, all three of which were unconstitutionally obtained.

Petitioner submits that Judge Boldt's summary dismissal without a hearing of petitioner's serious claims under Section 2255 is patently erroneous because it is based entirely and solely on Judge Boldt's memory of the sentencing of petitioner 12 years earlier, and not on the petitioner's motions or the files and records of the sentencing as required by the statute. Furthermore, the motions, files and records contradict Judge Boldt's memory of the sentencing considerations 12 years earlier.

In affirming the denial of petitioner's motions without hearing, the Ninth Circuit applied the following standard of review:

". . . we will not refute the sentencing

judge's own estimate of the deleterious impact of prior convictions upon his determination of the sentence." (Memorandum Decision, page 2). The practice of non-review has been followed in two previous cases by the Ninth Circuit. DUKES V. UNITED STATES, 492 F.2d 1187 (9th Cir. 1974); UNITED STATES V. EIDUM, 474 F. 2d 581 (9th Cir. 1973).

The standard of review applied by the Ninth Circuit is erroneous since it fully accepts, without an evidentiary hearing as required by statute, the memory of the sentencing judge as to his considerations in setting sentence.

The petitioner's motions, along with the files and records of the case, do not "conclusively show" that petitioner's claim is without merit. Cf. PROCUNIER V. ATCHLEY, 400 U.S. 446. Consequently, it was error for the District Court to deny petitioner's motion without permitting a full hearing.

C. THE ORIGINAL SENTENCING JUDGE IS FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT FROM DECIDING PETITIONER'S SECTION 2255 MOTION ALLEGING THAT SAME JUDGE'S UNCONSTITUTIONAL ENLARGEMENT OR ENHANCEMENT OF PETITIONER'S SENTENCE.

Should this Court decide to remand the case to the District Court for full hearing on petitioner's motions, petitioner strongly urges that this Court order the sentencing judge be disqualified from hearing and deciding petitioner's motions.

Nothing in the statute 28 U.S.C. Section 2255 requires that the original sentencing judge hear the motion under that statute. HALLIDAY V. UNITED STATES, 380 F.2d 270 (1967). The First Circuit has exercised its supervisory powers over its District Courts to require

that a judge other than the one imposing sentence decide certain motions brought under Section 2255. HALLIDAY, SUPRA.

In HALLIDAY, the First Circuit emphasized that the judge's personal recollections are not part of the record in a Section 2255 proceeding. 380 F.2d at page 273. The First Circuit's rule disqualifying the sentencing judge from hearing Section 2255 motions is based on the perceived impropriety of permitting the sentencing judge to determine his own credibility on evidence relevant to the Section 2255 motion. Similar concerns exist when it is the judge's memory which is at issue.

Petitioner submits that the impropriety of permitting the sentencing judge to decide petitioner's Section 2255 motions rises in this case to

constitutional proportions. A denial of due process has resulted and will result from permitting the ruling judge to rely on evidence; namely, his memory of the sentencing proceedings, which has not been subjected to adversarial cross-examination. This is especially true here, where the District Court Judge's memory 12 years later of the considerations on which he based sentence is directly contradicted by the statements made by that same judge at the time of imposing sentence. It is further submitted that the extraordinary burden of reviewing the entire trial record, a burden falling upon Judge Boldt by the demise of Judge Tolin, and the subsequent burdens of deciding numerous motions reviewing petitioner's conviction and sentence, have resulted in Judge Boldt's uncharacteristic impatience with the present motions of petitioner

which are in fact based upon serious and substantial issues of law.

The sentencing judge at the time of sentence stated the basis upon which the sentence was made. It was based substantially and primarily on three prior felony convictions. The record so reflects. All three are alleged to have been unconstitutionally obtained. The sentencing judge now, 12 years later, states in his opinion that the basis for the sentence was something other than that which the record reflects. Petitioner has been denied a hearing in the Federal District Court and in the Court of Appeals to challenge the judge. If such rulings stand, the decisions of this Court are meaningless. If the rule of law which this Court has heretofore set down prohibiting a trial judge from either enlargeing or

enhancing a sentence based upon unconstitutionally obtained priors means anything at all, it means at least that the rule be subject to a standard adversary proceeding. To permit a trial judge to unilaterally assess whatever he desires to his motivations for a prior sentence, regardless of the record, is to make the rule meaningless. It has recently been held that not even the highest officer in the Executive Branch of government, the President of the United States, can subjectively direct to another branch without objective standards. UNITED STATES V. NIXON, 94 S.Ct. 3090 (1974).

For these reasons, it is urged that petitioner has been denied Due Process of Law by the sentencing judge's summary dismissal without hearing of petitioner's meritorious Section 2255 motions.

CONCLUSION

This case presents an important question of federal law which has not been, but should be, determined by this Court; in addition, this case involves decisions of the Ninth Circuit and of a District Court which depart from this Court's decisions in SANDERS V. UNITED STATES, GIDEON V. WAINWRIGHT and TUCKER V. UNITED STATES.

For these reasons, and the reasons stated previously, petitioner respectfully requests that this Court issue a Writ of Certiorari in the instant case.

Respectfully submitted,

LAW OFFICES OF HARRISON W. HERTZBERG

By _____
HARRISON W. HERTZBERG
Attorneys for Petitioner

AFFIDAVIT OF SERVICE BY MAIL - 1013a, C.C.P.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

ERIKA JOHNSTON being first duly sworn says: that affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 3550 Wilshire Boulevard, Los Angeles, California.

That on October 28, 1974, affiant served the within PETITION FOR WRIT OF CERTIORARI on the Respondent in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at 3550 Wilshire Boulevard, Los Angeles, California addressed as follows:

WILLIAM D. KELLER, United States Attorney; ERIC A. NOBLES, Assistant U. S. Attorney, Chief, Criminal Division; VINCENT J. MARELLA, Assistant U. S. Attorney; 1200 U.S. Court House, 312 North Spring Street, Los Angeles, CA 90012.

SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

WILLIAM SAXBE, Attorney General, Department of Justice, Washington, D.C.

Erika Johnston
(Affiant's signature)

SUBSCRIBED AND SWORN to before me this 28 day of October, 1974.

Haskell H. Grodberg
Notary Public in and for said County and State SEAL

OFFICIAL SEAL
HASKELL H. GRODBERG
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 26, 1977

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APPENDIX A

[November 5, 1973]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH SICA, Petitioner,	)	No. 72-1814-GHB
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	ORDER DENYING MOTION PER TITLE 28 USC 2255

Shortly following entry of the mandate finally affirming his conviction,[1] petitioner applied for a reduction of sentence which, after hearing, was denied and that ruling was affirmed on appeal March 15, 1966.[2] This proceeding is the latest of repeated formal and informal applications by defendant for the same or similar relief asserted on various grounds.

Even an abbreviated recital of the facts and law pertaining to petitioner's legal contentions in this proceeding would require extensive statement and dissertation. In these circumstances and considering that petitioner has now been enlarged on parole,

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[1] Carbo v United States, 314 F.2d 718 (9th Cir. 1963); cert. denied 377 U.S. 953 (1964); Rehearing denied.

[2] Carbo and Sica v United States of America, 357 F.2d 800 (9th Cir. 1966); cert. denied 385 U.S. 823 (1966)

no useful purpose would be served by adding to the enormous amount of judicial opinion writing time and effort that has previously been expended in hearing, considering and determining rulings on petitioner's innumerable contentions and assertions of fact in this case during the nearly twelve years since sentence was imposed December 2, 1961.

The petition now before the court was filed August 8, 1972 but, due to stipulations extending time for briefing, it was not submitted for determination until the final brief was filed June 5, 1973. Since that time all of the material submitted in support of and in opposition to the petition has been reviewed and considered in meticulous detail.

The unusual facts and circumstances in which the challenged sentence was considered and determined will be briefly stated and is entirely based on the record or within the personal knowledge of the undersigned judge.

As noted by the Court of Appeals at page 749 of the first footnoted opinion, the undersigned judge, as successor to Judge Tolin, spent more than three months in intense and detailed study of 7,500 pages of trial transcript condensed by this judge into an abstract of 1,320 pages. That extraordinary experience was the primary basis on which the varied sentences, ranging down from 25 years imprisonment to fine and probation, were imposed on each individual defendant including Sica. The period of imprisonment to which Sica was sentenced was less than that given Carbo and substantially more lenient than the maximum that

might have been imposed by ordering that the imprisonment terms on other counts of which Sica was convicted be served consecutively rather than concurrently as actually was provided.

The laborious process of closely examining every page of the trial transcript in order to evaluate the credibility and significance of the testimony of all witnesses, including Sica, provided a more important and significant basis for determining the sentence appropriate for Sica than any information contained in the presentence report and in the mind of this judge, in itself, amply justified the sentence imposed. This will be indisputably established by a review of the portions of the trial transcript pertaining to Sica.

The indictment contained ten counts, the first of which charged all defendants with a conspiracy to extort in violation of the Hobbs Act, 18 USC 1951, by threats of violence against the alleged victims, and specified the part played by each defendant, including Sica. The indictment alleged that the conspiracy contemplated the use of "persons known to said victim to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence" and the enlistment of Sica for this purpose. There was substantial evidence to the effect that the victims knew of Sica as an "underworld" man and a "strong-arm" man. Proof beyond reasonable doubt of these allegations was essential to Sica's conviction and by the jury verdict must be accepted as established fact; moreover, in this particular, the evidence overwhelmingly supported the verdict in appraisal by the sentencing judge.

Sica's vigorous and persistent challenges to admission of the evidence concerning his character and reputation were denied by the trial court and affirmed on appeal after extended discussion in the affirming opinion supra at p. 739 under the heading SICA'S UNDERWORLD REPUTATION. In all the circumstances hereinabove set forth, the sentencing judge was entitled to and, in fact, did base Sica's sentence solely on the depravity and viciousness of his conduct as disclosed by the trial record.

In the light of the unique circumstances related above, the contentions so belatedly asserted concerning the alleged effect of prior convictions on the sentencing judge would hardly merit serious consideration; nevertheless they have been given just that.

After full and careful review, each of the contentions now presented for determination is found to be without merit as a matter of law for the reasons and on the authorities specified in respondent's two memoranda submitted in opposition to the petition. Accordingly, hearing thereon is not required and it is hereby

ORDERED that the petition filed by Joseph Sica August 8, 1972, should be and the same is hereby denied and dismissed.

DATED this 2nd day of November, 1973.

/s/ George H. Boldt
SR. UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH SICA, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 73-3603 MEMORANDUM

[August 7, 1974]

Appeal from the United States District Court from the Central District of California

Before: KOELSCH, WRIGHT and TRASK, Circuit Judges

This appeal from a denial of a petition for relief under 28 U.S.C. §2255 is a continuation of a lengthy course of litigation beginning with an indictment returned on September 22, 1959.

On May 30, 1961, appellant was found guilty by a jury on three counts of violating 18 U.S.C. §§1951, 371 and 875(b) (interference with commerce by threats or violence, i.e., racketeering). On June 11, 1961, the trial

judge died and the Honorable George H. Boldt, United States District Judge for the Western District of Washington, was designated to hear and dispose of all remaining matters. He heard post-conviction motions and undertook to review the entire record (involving appellant and four others likewise found guilty) before sentencing. The care with which this was done was evidenced by the court's filing of an Abstract of Testimony consisting of ten volumes. Further argument was heard, motions were denied and appellant was sentenced. This court affirmed as to two of the three counts. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). Subsequent proceedings for reduction of sentence were unsuccessful. Sica v. United States, 408 F.2d 381 (9th Cir. 1969); Sica v. United States, 454 F.2d 281 (9th Cir. 1971).

On this appeal Sica contends that he was prejudiced because of evidence of prior convictions unconstitutionally obtained under Gideon v. Wainright, 372 U.S. 335 (1963). The contention is rejected. The prior convictions were introduced by Sica upon his own direct examination. He may not complain that his own considered action violated his constitutional rights. Shorter v. United States, 412 F.2d 428 (9th Cir. 1969).

Sica next asserts that his sentence was improperly increased because of the three prior felony convictions he contends were unconstitutionally obtained. He seeks an evidentiary hearing to determine if the sentence was affected by the evidence he complains about. This petition must also be rejected. The sentencing judge spent "more than three months in intense and

detailed study of 7,500 pages of trial transcript" which he condensed into an abstract of 1,320 pages. This prodigious effort afforded "a more important and significant basis for determining the sentence appropriate for Sica than any information contained in the presentence report," and, again in the words of the court, "amply justified the sentence imposed." He stated that he based the sentence "solely on the depravity and viciousness of [Sica's] conduct as disclosed by the trial record." We have held that we will not refute the sentencing judge's own estimate of the deleterious impact of prior convictions upon his determination of the sentence. Dukes v. United States, 492 F.2d 1187 (9th Cir. 1974); United States v. Eidum, 474 F.2d 581 (9th Cir. 1973). That principle quite clearly applies here.

The judgment is affirmed.

AFFIDAVIT OF SERVICE BY MAIL - 1013a, C.C.P.

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

VICTORIA A. PEASLEY, being first duly sworn, says: that affiant is a citizen of the United States and a resident of the county aforesaid; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 3550 Wilshire Blvd., Suite 1418, Los Angeles, Calif.

That on November 4, 1974 affiant served the within APPENDICES TO PETITION FOR WRIT OF CERTIORARI on the Respondent in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at 3550 Wilshire Boulevard, Los Angeles, California addressed as follows:

WILLIAM D. KELLER, United States Attorney; ERIC A. NOBLES, Assistant U.S. Attorney, Chief, Criminal Division; VINCENT J. MARELLA, Assistant U.S. Attorney; 1200 U.S. Court House, 312 North Spring Street, Los Angeles, Calif. 90012.

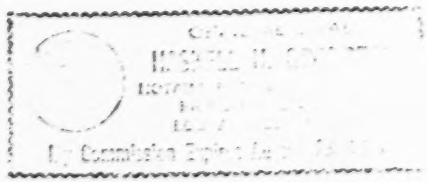
SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530.

WILLIAM SAXBE, Attorney General, Department of Justice, Washington, D.C. 20530.

Victoria A. Peasley
(Affiant's Signature)

SUBSCRIBED AND SWORN to before me this 4th day of November, 1974.

Hackett H. Goolsby
Notary Public in and for said County and State



In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-512

JOSEPH SICA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the judge relied upon constitutionally infirm convictions in imposing sentence; that his motion filed pursuant to 28 U.S.C. 2255 should not have been denied without a hearing; that due process requires a judge other than the sentencing judge to hear such motions; and that this Court should exercise its supervisory power to achieve that result.

After a jury trial in the United States District Court for the Southern District of California (now the Central District), petitioner was convicted of conspiracy to commit extortion, in violation of 18 U.S.C. 1951 (count one), conspiracy to commit an offense against the United States, in violation of 18 U.S.C. 371 (count four), and conspiracy to transmit threats by means of interstate communications, in violation of 18 U.S.C. 875(b) (count five). He was sentenced to twenty years' imprisonment and fined $10,000

on count one. On counts four and five he was sentenced to five years' imprisonment on each count, to run consecutively with each other but concurrently with count one. The court of appeals affirmed on counts one and four but reversed and remanded on count five. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. Petitioner was not retired on count five.

Petitioner then brought the present proceedings under 28 U.S.C. 2255, challenging the imposition of his sentence. Judge Boldt, who had sentenced petitioner, denied the motion without a hearing, and the court of appeals affirmed.

Evidence adduced at trial[1] showed that petitioner was one of the "strong-arm" men in a conspiracy to secure managerial control of Don Jordan, a welterweight fighter who later won the title. When Jordan's manager refused to relinquish control, the co-conspirators sought the assistance of petitioner who, as revealed during trial, had a reputation for violence.

1. Petitioner's contention that Judge George Boldt[2] relied upon constitutionally infirm convictions in imposing sentence was explicitly rejected by that judge in his denial of petitioner's motion to vacate sentence.[3] In his order denying the motion Judge Boldt said (App. A, pp. 3-4):[4]

> The laborious process of closely examining every page of the trial transcript in order to evaluate the credibility and significance of the testimony of all

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[1]A detailed description of the activities of this conspiracy can be found in *Carbo* v. *United States, supra.*

[2]The original trial judge, Judge Tolin, died before sentencing. Judge Boldt was assigned to the case and reviewed the record for approximately four months before imposing sentence.

[3]Petitioner contends that his prior convictions are invalid under *Gideon* v. *Wainwright,* 372 U.S. 335. The record does not disclose whether there is any substance to this contention.

[4]"App." refers to the separate appendix filed with the petition. The pages are unnumbered, but our reference is to the third page of the order in question.

> witnesses, including Sica, provided a more important and significant basis for determining the sentence appropriate for Sica than any information contained in the presentence report and in the mind of this judge, in itself, amply justified the sentence imposed * * *.
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> * * * In all the circumstances hereinabove set forth, the sentencing judge was entitled to and, in fact, did base Sica's sentence solely on the depravity and viciousness of his conduct as disclosed by the trial record.

This statement by Judge Boldt that petitioner's sentence was based solely on the depravity and viciousness of his conduct as disclosed in the trial record is consistent with the record at sentencing. While the judge mentioned petitioner's felony convictions (Pet. 10), his characterization of petitioner as an habitual criminal who had never followed any socially productive pursuits was made after extensive review of the trial transcripts and does not show a reliance upon his three prior felony convictions. The judge was of course entitled to consider factors other than criminal convictions in imposing sentence. See *United States* v. *Marcello,* 423 F. 2d 993, 1012 (C.A. 5), certiorari denied, 398 U.S. 959.

Since the record does not support petitioner's contention that the judge explicitly relied upon the arguably infirm convictions, and the judge stated that the sentence was not enhanced because of those convictions, petitioner's reliance upon *United States* v. *Tucker,* 404 U.S. 443, is misplaced and he is not entitled to resentencing. *United States* v. *Green,* 483 F. 2d 469, 471 (C.A. 10), certiorari denied, 414 U.S. 1071; *Rogers* v. *United States,* 466 F. 2d 513 (C.A. 5), certiorari denied, 409 U.S. 1046.

2. Nor did the judge violate 28 U.S.C. 2255 in denying petitioner's motion without a hearing. Contrary to his contention, petitioner did not make a *prima facie* showing of the judge's reliance upon invalid convictions; the records and files of the case fully support the opposite conclusion. Indeed, a hearing is singularly inappropriate where the question turns upon the state of mind of the judge himself. Of course, if the judge had determined that the allegedly infirm convictions had influenced his imposition of sentence, a hearing to examine the validity of the convictions might have been required, but not otherwise. See, *e.g.*, *Lipscomb* v. *Clark*, 468 F. 2d 1321, 1323 (C.A. 5).[5]

3. Due process does not require a judge other than the sentencing judge to hear motions alleging enhancement of sentence based on constitutionally infirm convictions. Petitioner's reliance upon *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1), 394 F. 2d 149, affirmed on other grounds, 394 U.S. 831, is misplaced. *Halliday* (*id.* at 274) specifically holds that a sentencing judge may review a Section 2255 petition to determine whether an evidentiary hearing is required. *Halliday*, moreover, was concerned with the desirability of a separate judge conducting a hearing on what occurred in the courtroom as to a plea of guilty, not, as here, what considerations the first judge had in mind in imposing the sentence. A separate judge would be peculiarly at a disadvantage in attempting to determine the basis upon which the other judge determined the sentence. See, *e.g.*, *United States* v. *Smith*, 337 F. 2d 49, 51-52 (C.A. 4), certiorari denied, 381 U.S. 916.

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[5]Some circuits have adopted the procedure that the petitioner must challenge the validity of the convictions prior to his filing of a Section 2255 motion. See *e.g.*, *Brown* v. *United States*, 483 F. 2d 116 (C.A. 4).

Petitioner has made no showing of bias or prejudice that should lead this Court, under its supervisory power, to exclude the sentencing judge from consideration of this motion. *cf. Elkins* v. *United States*, 364 U.S. 206.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-512

JOSEPH SICA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The government contends that the sentencing judge did not violate 28 U.S.C. 2255 in denying Petitioner's motion without a hearing. The government contends Petitioner did not make a *prima facie* showing of the judge's reliance upon the

invalid convictions, and that the records and files of the case fully support the sentencing judge's conclusion. The government further contends that a 28 U.S.C. 2255 hearing is "singularly inappropriate where the question turns upon the state of mind of the judge himself." (Memorandum in Opposition, p. 4.) The government further argues that if the judge admits the unconstitutionally obtained convictions influenced the sentence, a hearing to examine the validity of the convictions might have been required, but not otherwise.

The answer to the government's contentions is obvious. If the prerequisite to a hearing required a showing of the judge's reliance upon invalid

convictions and that showing can only be made if the sentencing judge himself admits his reliance thereon, then a hearing can only be had where the judge makes that admission. If the judge denies, as here, reliance on prior convictions for a severe sentence, no hearing can be had. This amounts to a denial of due process for no inquiry is permitted into the judge's state of mind. Petitioner contends that evidence will objectively show the sentencing judge based his sentence on Petitioner's felony record.

This Court has rejected the right of any government official, even the President of the United States, to subjectively direct another branch of government without objective standards. U.S. v. Nixon, 94 Supreme Court 3090 (1974).

On December 2, 1961, the sentencing judge stated, at the time of sentence:

> "Much of what has been said of Carbo applies to Sica. Sica may not be as widely known, or a criminal of national repute, but has a long record of violence, vice and viciousness, including felony convictions and involvement in various crimes of violence. By any definition or standard, Sica appears to be an habitual criminal. There is no indication that Sica has ever followed any productive or peaceful pursuit of any consequence in all the 50 years of his life. He, too, must be restrained from preying on the community for a substantial period -- somewhat less than that of Carbo because of Carbo's

more important part in the offenses involved in this particular case." (Emphasis added) (Record on Appeal, p. 78.)

This statement was made, at the time of sentencing, after the United States Attorney stated Sica had been convicted of three felonies.

The record reflects that all three prior felony convictions were unconstitutionally obtained in that Sica was not represented by counsel, nor did he had the advice of counsel.

(a) The first of such alleged prior convictions was May 13, 1930, in New Mexico. (See p. 75, Record on Appeal, Exhibit p. 117.)

(b) The second alleged prior felony conviction involved the charge of Larceny, in New Jersey, on

October 11, 1928. (See p. 76 Record on Appeal, Exhibit p. 109.)

(c) The third alleged prior felony conviction involved the charge of Robbery on April 7, 1932, in the State of New Jersey. (See p. 77, Record on Appeal, Exhibits p. 98.)

Yet the government dismisses Sica's contention that Judge Boldt "relied upon constitutionally infirm convictions in imposing sentence" by merely concluding it was "explicitly rejected by that judge in his denial of petitioner's motion to vacate sentence." (Government Opposition, p. 2.) Petitioner has requested the record on appeal be certified to this Court to establish the substance of his contention that all three prior felony convictions are constitutionally infirm in answer to

footnote 3, p. 2, Memo in Opposition.

Judge Boldt, 12 years later, in his Order denying the motion without a hearing, states that he "did base Sica's sentence solely on the depravity and viciousness of his conduct as disclosed by the trial record." However, Judge Boldt was not the trial judge; the judge died and Judge Boldt was the sentencing judge.

Petitioner forcefully contends that nowhere can it be found that any judge has the unbridled subjective discretion to foreclose the right to be heard based upon his own state of mind. Minimal due process requires that Petitioner be permitted to introduce evidence allowing him to establish the fact that his sentence was enhanced because prior felony convictions were considered. Petitioner has established that which is sufficient to plead a case as

is required by 28 U.S.C. 2255, as a matter of law.

Additionally, the matter was decided by the Court of Appeals (9th Circuit) without a hearing after Petitioner filed his written motion requesting oral argument, which motion was not acted upon. (Petitioner has requested that the record of the Court of Appeals be certified to this Court.)

It is therefore respectfully submitted that the Petition for a Writ of Certiorari be granted.

Dated: January 29, 1975.

Respectfully submitted,

LAW OFFICES OF HARRISON W. HERTZBERG

By: /s/
HARRISON W. HERTZBERG,
Attorneys for Petitioner